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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

UNITED LIQUORS CORPORATION, SIDNEY PERLBERG, KING KLEIN, HUBERT R. LEWIS, ALEX BARZIZZA and GEORGE B. HART

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court for the Western District of Tennessee, Western Division

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Western District of Tennessee, Western Division, entered on August 1, 1956, holding that appellants combined and conspired to restrain interstate commerce in the sale of alcoholic beverages within the State of Tennessee in violation of Section 1 of the Sherman Act, and enjoining the appellants from certain lawful activities in the conduct of their business, as appears from a copy of said judgment which is hereto attached.

OPINION BELOW

The District Court entered no opinion on the final judgment. It did deliver an opinion from the bench on a motion to stay the judgment. The opinion on the motion to stay, the findings of fact, conclusions of law and judgment are attached hereto as Appendix A.

JURISDICTION

This suit was brought under Section 1 of the Sherman Act, 15 U.S.C. § 1. The judgment of the District Court was entered on August 1, 1956, and notice of appeal was filed in that court on September 20, 1956. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 15 U.S.C. §§ 28 and 29. The following decision sustains the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *California Co-operative Canneries,* 279 U.S. 553 (1929).

QUESTIONS PRESENTED

1. Whether it is a violation of the Sherman Act for a wholesale liquor dealer to request his suppliers to institute lawful fair trade in the distribution of liquor where (a) he was acting in response to a request by an association of his retailers, and (b) the purpose of the retailers was not the protection of the manufacturer's good will in the trademarks, brands or names involved but rather to obtain a system of uniform retail prices and to prevent predatory price cutting at the retail level.

2. Whether it is a violation of the Sherman Act for the members of an association of wholesalers to discuss at their meetings the desirability of manufac-

turers adopting fair trade contracts in their local area and to urge each other to recommend to their own suppliers a policy of fair trade.

3. Whether a decree which puts smaller competitors under a competitive handicap with respect to larger concerns in the area is an appropriate equitable remedy in the enforcement of the antitrust laws and the restoration of competition for the future on the assumption that the small competitors so restricted violated the law in the past.

4. Whether after a conspiracy to fix prices had been abandoned for many years and never revived and where there is no likelihood that it will be revived, it is appropriate for a court of equity to impose upon the appellants the penalty of an injunction against such abandoned practices.

5. The above questions are raised by the findings of the court apart from the transcript of testimony. Appellants will also argue that the findings are not supported by the evidence.

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1; The Fair Trade Act of Tennessee, 69-202 — 69-205.

STATEMENT

The marketing area of Memphis, Tennessee, is supplied by eight wholesale liquor dealers. There are about 161 retail stores. Five of the wholesale liquor dealers are appellants in this case. The largest wholesaler, Consolidated Distributors, is not a party. It controls about 30% of the wholesale liquor market in

the entire area (Affidavit of Sidney Perlberg in support of motion to stay). It is approximately twice the size of the largest of the appellants.

The Government brought this suit charging a conspiracy to fix prices against the retailers, the retail association, and the wholesalers and their association. The bulk of the complaint consists of charges against the retailers. The retailers and their association signed a consent decree which enjoins them from all the activities complained of. A default judgment was taken against the wholesalers' association. There remain in the proceeding only the five wholesaler appellants.

The record and findings disclose the following:

As early as 1949 an association of retail dealers had been formed in Memphis to eliminate cutthroat competition at the retail level (Fdg. VII). For a brief period from 1949 to late 1951 this association of Memphis retail dealers had conspired with all the wholesalers, including appellants, to fix retail prices by eliminating quantity discounts and adhering to an OPA formula (Tr. 137, 270-72). Consolidated Distributors was a party to this conspiracy and adhered to the formula (Tr. 161-67, 180, 186, 188, 274). The retail association attempted to make the scheme effective by boycotting the brands of the wholesalers who sold to cut price stores. (Tr. 204).

The 1949 conspiracy completely broke down in late 1951 (Tr. 188, 1343). After that competition became so keen that it was driving many of the smaller stores out of business (Tr. 1115, 1345, 1449-52). The retailers felt themselves in desperate straits. From November 1951 to 1954 the retailers unsuccessfully tried to induce distillers to fair trade their brands. In December 1953 the retail association appointed a

fair trade committee for the purpose of putting organized pressure on the manufacturers. In January 1954 that committee called on each of the Memphis wholesalers asking each of them to express his views on fair trade (Tr. 189-94, 751-56, 768-69, 922-25, 1389). Faced with the organized demands of the retailers each of the wholesalers, including both appellants and Consolidated Distributors, sent a letter to the retail association stating that they were in favor of fair trade contracts in the distribution of liquor in Memphis (Exs. 42-49).

The purpose of the retail association in obtaining these letters was to influence the distillers who had the power to initiate fair trade contracts (Tr. 347-353, 516-524). Mere persuasion, however, proved to be ineffective. Thereupon, from March to September 1954 the retailers circulated literature recommending that non-fair trade brands be boycotted in Memphis, and a number of boycotts were instituted (Tr. 222-24, 704-12, 749-50, 1054-55). As a result of this pressure by September 1954 nearly all the brands distributed by appellant wholesalers had been made subject to fair trade contracts by the manufacturers. The record is clear, however, that none of the appellant wholesalers participated in any way in such boycott (Tr. 706-7, 756-58, 1153-54, 1386). Indeed, they themselves were the victims of the economic pressure exerted by the retail organization.

Nor did appellant wholesalers put any pressure on their suppliers to adopt fair trade (Tr. 848-50, 855-59, 873-80, 1242, 1316, 1354-64, 1454, 1486). They reported the situation to their suppliers (Tr. 855-59). Two of them made no recommendation. Others recommended fair trade with respect to some brands but

not as to others, as a matter of business advice to their suppliers (Tr. 1357-64, 1365-77, 1431-54, 1486, 1490).

The record is clear that no concerted action was ever taken by the wholesalers and that neither as a group nor individually did they ever urge a policy of fair trade of all brands on their suppliers as a means of stabilizing prices in the Memphis area (Tr. 1358-70, 1454, 1486). There is no evidence that they joined in any way with the retailers in their price stabilization efforts (Tr. 874-80, 1027-28, 1046, 1117, 1143-46, 1284-85, 1355-56, 1386).

Not one retailer testified that their efforts in attempting to stabilize the retail market in 1954 were participated in by a single wholesaler (Tr. 1027-28, 1145-46). The record affirmatively shows that the literature published was written by members of the retail association (Tr. 1005-1011, 1052, 1055); that the retailers' committees were their own innovation and received their instructions from the officials of the retail association (Tr. 525-29, 559-66, 641-48, 705-7, 1139-40); and that their negotiations with distillers were on their own initiative and were not participated in by a single wholesaler (Tr. 997-8, 1013, 1046).

By September 1954, as a result of the boycotts of the retailers, most of the brands distributed by appellants had become fair traded by the manufacturers. However, these fair trade contracts were not effective in stabilizing prices. They were ignored by the price cutting retailers and not enforced by the manufacturers (Tr. 491-500, 1377-78). One manufacturer whose products had been fair traded in 1953 in conformance with its national policy, (Tr. 874-80, 1284-85, 1355-56), Seagram, did obtain two injunctions. In spite of

the retail pressure, appellant Lewis privately recommended that the injunctions be dissolved (Tr. 1378-80). The record shows no instance of any recommendation of any appellant that fair trade contracts be enforced.

On these facts the court found generally that appellant wholesalers had conspired and agreed to fix and maintain prices. The principal specific finding as to the activities of appellant wholesalers reads as follows (Finding XVII):

> "In January 1954, the retail association appointed a so-called 'Fair Trade Committee' which formally called upon each of the defendant wholesalers and other Memphis wholesalers and requested their active support and assistance in influencing their respective suppliers to enter into 'fair trade' agreements in the Memphis trading area. Each of the defendant wholesalers was at that time, and for several years had been, fully aware of the purposes, objectives and activities of the Memphis Retail Package Stores Association in its efforts to eliminate price cutting and to otherwise establish uniform prices, mark-ups and profit margins on all alcoholic beverages sold in the Memphis trading area. Each of the defendant wholesalers at that time knew that it was not the purpose or intent of the retail association to promote the purpose of the Miller-Tydings Act, or the McGuire Act, or the Fair Trade Law of Tennessee, or to establish prices for the protection of the good will in the trademarks, brands or names of the manufacturers of alcoholic beverages. To the contrary, each of the defendant wholesalers was at that time fully aware of the purpose to use 'fair trade' agreements as devices for establishing and enforcing adherence to a system of uniform retail prices pursuant to an agreement and understanding among members of the retail association. *In response to the request of the Fair Trade Committee, each of the defendant wholesalers*

agreed to urge his suppliers to fair trade." (Emphasis supplied)

It is important to note that only the last sentence relates to any activity on the part of the wholesalers. This finding constitutes the sole basis for liability on the part of the appellants.[1] Practically all of the other findings are solely concerned with the activities of the retailers and their association. The only findings, in addition to Finding XVII quoted above, which involve appellants are Findings XX, XXIII and XXV. They add nothing to Finding XVII.[2]

---

[1] Apart from the 1949 conspiracy which ended in 1951.

[2] Finding XX simply states that all of the appellants were "acutely aware" of the nature and purpose of the retail association's boycotts at the time they advised with their suppliers and recommended action with respect to avoiding the retailer discrimination against their products. The implication of Finding XX is that appellants had no right to advise their suppliers as to how to meet the problem of the boycotts or to suggest that by entering into fair trade contracts they might increase their sales.

Finding XXIII states that "the Executive Secretary of the Memphis Wholesale Liquor Dealers Association resigned his position following the Association's action in reducing his salary and expressing dissatisfaction with his services for the stated reason that he was unable to bring one member, Consolidated Distributors, 'into line' with the seven other members". A reading of the record makes it clear that the above phrase "bring one member, Consolidated Distributors, into line" does not refer to fair trade contracts at all but to the question of the salary of the secretary (Tr. 219-22, 1287, 1298, 1335, 1346-49, 1458-62). There was no "line" among wholesalers in favor of recommending fair trade to their suppliers.

The only other finding involving the wholesalers is Finding XXV which states that the manufacturers "were pressed" by the retail association "through their respective local representatives and wholesalers in Memphis, . . . , to enforce adherence to the minimum resale prices so established." There is no evidence in the record that any such pressure was put on by the wholesalers.

Therefore, the liability of the appellants for their alleged conspiracy to urge fair trade on their suppliers rests on Finding XVII alone.

The Decree

The District Court declared as a matter of law that appellants had agreed to fix and maintain prices. It entered a decree enjoining appellants in general language from taking any concerted action to fix prices. The decree went further and provided in two drastic provisions that appellants during a period of five years could not give information as to suggested resale prices, mark-ups or margins of profit either to their customers or their suppliers. In addition it prohibited appellants from adhering to any fair trade contract which the suppliers might enter into under the fair trade laws of Tennessee.

The position of appellants is:

First, there is no need for the interposition of the court of equity on account of the 1949 conspiracy which was abandoned.

Second, that appellants' activities in 1954 with respect to fair trade contracts were lawful.

Third, that even if appellants had been guilty as charged Paragraphs V and VI of the decree would be improper use of the power of a court of equity.

The only instance in the record of advice by an appellant to his supplier with respect to policing fair trade contracts is the advice of appellant Lewis that Seagram dissolve its pending injunctions against retailers (Ex. 160, Tr. 1379).

(1) There is no need for the interposition of a court of equity with respect to the 1949 conspiracy abandoned in 1951.

The record shows that the conspiracy existing for the period between 1949 and late 1951 was abandoned in 1951 (Tr. 188, 1343). Competition was restored, drastic price cutting became the rule (Tr. 1115, 1345, 1449-52). The record shows no desire or intention or even interest among the wholesalers to fix resale prices. One of them, United Liquors Corporation, was itself boycotted (Tr. 204). Consolidated Distributors, one of the leading parties in the 1949 conspiracy was not made a party here. There is no reason for an equitable decree under these circumstances. *U.S.* v. *Oregon State Medical Society,* 343 U.S. 326 (1952).

(2) Appellants' activities in 1954 with respect to fair trade contracts were lawful.

Appellants have been held guilty of violation of the antitrust law on the ground that when faced with retailer boycotts which were causing loss of sales, they expressed views to a committee of the retail association favoring a policy of fair trade. This is all the record shows appellants did.

It is true that Finding XVII states that *each* individual appellant also "agreed to urge . . . fair trade" to his supplier (But see Ex. 42-49). But the finding does not say that the appellants actually did urge such a fair trade policy on their suppliers. In fact the record shows they did not do so (Tr. 1145, 1153-54, 1473-75, 1498). Some declined to take a position (Tr. 1285, 1486, 1490). Others recommended fair trade with respect to minor brands and against it with respect to their major suppliers. (Tr. 1357-63, 1365-77, 1431, 1454).

Nor would there have been any violation of law had each wholesaler agreed (as Finding XVII states) under pressure of boycott of his goods to "urge" on his supplier a policy of fair trade to avoid loss of sales. A victim does not join a conspiracy by acting to avoid its consequences. If the wholesaler had agreed to give misleading and fraudulent advice to his supplier the case would be different. But here there is not the slightest suggestion in the record of any fraud or other pressure on the supplier by the wholesaler.

The record is clear that the wholesalers did not take any concerted action as a group to recommend fair trade (Tr. 874-80, 1284-85, 1355-56). But suppose that the wholesalers' association as a group had decided to recommend to their suppliers that a fair trade policy be generally adopted as an appropriate business policy. Fair trade is of course a means of price fixing, but it is approved by the Legislature of Tennessee, and validated by the McGuire Act. It is not a violation of the antitrust laws. We assert that an association of wholesalers may recommend to their several manufacturers, that such a lawful policy should be adopted. Certainly such a group recommendation, even if it had occurred, in the absence of any coercion, would not have come within the proviso of the McGuire Act, which reads as follows:

> "Provided further, That the preceding proviso shall not make lawful any contract or agreement, *providing for the establishment or maintenance of minimum resale prices on any commodity* herein involved, between manufacturers, or between producers, or *between wholesalers*, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." 15 U.S.C. § 1 (Emphasis supplied)

An agreement to urge a policy of fair trade is not an agreement to establish minimum resale prices within the prohibition of the above language. It does not even suggest at what prices the manufacturers should fair trade. This is not a situation in any respect comparable to *United States* v. *McKesson and Robbins, Inc.*, 351 U.S. 305 (1956), where a wholesaler who was also a manufacturer, and thereby had the power to initiate fair trade contracts, entered into resale price maintenance contracts with ninety-four other wholesalers who were in competition with it in its wholesale business.

If as a solution to the loss of sales by organized retailer boycotts the wholesalers actually had urged fair trade, their objective was a lawful one approved by Tennessee and Congress. If the means used to accomplish that objective were persuasion those means were lawful. The Government must concede that the mere suggestion of resale prices is lawful. *Maple Flooring Mfgrs.' Ass'n* v. *U. S.*, 268 U.S. 563 (1925). Here this small group of local wholesalers without power over their great national suppliers are not suggesting prices but only a lawful policy of fair trade.

But the record is clear that appellants did not act as a group. Perhaps for this reason the court in Finding XVII appears to base its charge of illegality on the fact that the appellants acted with knowledge that the purpose of the retailers was to stabilize prices. But this has been held by the Supreme Court of Tennessee as a legitimate purpose for entering into a fair trade contract. *Seagram Distillers Corp.* v. *Cornswet*, 281 S.W. 2d 657, 661 (Tenn).

(3) The decree is improper because it handicaps without justification the future competition of appellants.

The general provisions of the decree which enjoin the appellants from concerted action or coercion to fix prices, while unjust and unnecessary, do not interfere with the future competitive position of the appellants. But the decree also enjoins the appellants from lawful activities, essential to the efficient operation of a wholesale liquor business, which their largest competitor, Consolidated Distributors, is free to engage in.

The two drastic provisions which put this competitive handicap on appellants read as follows:

> "V(A) Each of the said defendants is enjoined and restrained, for a period of three years from the effective date of this final judgment, from disseminating, or preparing for dissemination, to any person price lists or other price information containing minimum or suggested resale prices, mark-ups, or margins of profit for alcoholic beverages to be sold or offered for sale to third persons;"
>
> "VI(A) Each of the said defendants is enjoined for a period of five years from the effective date of this final judgment, from entering into, adhering to, or pricing pursuant to any fair trade contract which purports to fix or control the resale price of any alcoholic beverage in the Memphis trading area, and, to the extent that any such defendant elects to sell alcoholic beverages in the Memphis trading area during said period of five years to do so at prices individually determined by himself, without reference to fair trade prices established thereon."

These two provisions of the decree prevent appellants from effectively competing with Consolidated which

is not bound by these restrictions for the following reasons:

The ability to give information as to price mark-ups, profit margins and suggested prices which will meet market conditions is an essential part of a wholesaler's service both to his customers and to his suppliers (Tr. 1395-98). The supplier depends upon the wholesaler for price information (Tr. 1370). Liquor is not sold on quality because the competing brands of whiskey are too much alike in that respect. Much of it is sold on snob appeal induced by tremendous expenditures for national advertising. The range of the wholesale price in any area must be determined on information, suggestions and advice from wholesaler to supplier as to the probable resale price. A wholesaler who cannot correspond or discuss with his supplier prices, mark-ups and margins of profit to retail stores cannot perform the proper functions of wholesale merchandising of liquor.

The decree also prevents appellants and their salesmen from giving necessary information to their retail customers. The retailer will push the brands on which he gets the greatest profit. The amount of any brand he buys depends on his business judgment as to what resale price is possible in his competitive area. He expects that kind of information from his wholesalers. With respect to a new brand which is being introduced the retailer without this information cannot have the slightest idea as to what resale price to put on it.

The liquor salesman is also under an obligation to urge retailers not to discriminate against the brands distributed by the wholesalers. If a saleman sees his competitor's brand priced at $3.00 and his own com-

peting brand priced at $3.25 he must discuss these prices with his customer and urge on him the policy of treating the brands the same. Here a suggestion of lower prices is required. On the other hand, there are situations where a supplier has spent millions of dollars in advertising to create a public demand for a brand at higher prices. In those cases the supplier expects his wholesaler to discuss the higher retail price possibilities created by nationwide advertising.

Indeed, the Court may take judicial notice that in every area of wholesale distribution the discussion will center on how much profit the retailer will make on the product. The salesman who is limited to talking about the quality of the suit cannot be an effective salesman. He will leave at the first opportunity if he is offered a place in a concern without these restrictions.

To sum up, a full and frank discussion of resale prices is essential in the wholesale distribution of liquor both for the purpose of giving information to the supplier and of providing effective salesmanship to the retailer.

The drastic character of the decree is emphasized by Section VI(A) which in effect enjoins the appellants from adhering to the State Fair Trade Law of Tennessee. Appellants have no control over their suppliers who are nationwide concerns. Yet if their supplier decides as a matter of policy to fair trade at the wholesale level under this decree the appellants must immediately cease to do business with such a supplier.

The decree can have only one effect if it is sustained. Consolidated Distributors which is free to

give effective service to its suppliers and to its retail customers will have a competitive advantage which will make appellants undesirable outlets. Their franchises may be cancelled at a moment's notice. Their suppliers will be compelled to seek out new wholesalers who are not bound by such restrictions. While these new wholesalers are establishing their businesses and good will Consolidated Distributors will gain competitively in the market. Not only will the business of appellants be destroyed but there will be less competition in the entire area.

The record discloses no possible reason for enjoining appellants from lawful sales activities. They acted under pressure which had been removed by the consent decree enjoining the retail stores. Their wholesale association has been dissolved and the appellants have been enjoined from using every conceivable unlawful means to fix prices. Competition in the Memphis market is keener than it ever was (Tr. 545, 671, 1057-66, 1402-06, 1449-52). And the Court may take judicial notice that no price fixing scheme can be effectively carried out by a combination of weaker units against a dominant concern. Consolidated Distributors is here the dominant concern in Memphis. The price fixing scheme of 1949 could not have succeeded even for the brief period it operated had not Consolidated Distributors been a party to that conspiracy. Under these circumstances, to put a crippling handicap on the future competitive position of appellants is an abuse of the power of a court of equity in an antitrust suit.

An antitrust decree may enjoin otherwise lawful practices because of past violation of the antitrust laws. But this is for the sole purpose of restoring and maintaining competitive conditions. The decree should

not put an unnecessary handicap on the future competitive effectiveness of a defendant. *Hartford-Empire Co.* v. *United States,* 323 U.S. 386 (1945); *United States* v. *National Lead Co.,* 332 U.S. 319, 349 (1947); *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593, 601, 603 (1951); *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 446 (2d Cir. 1945); 91 F. Supp. 333, 418 (S.D.N.Y. 1950).

THE QUESTIONS ARE SUBSTANTIAL

To sum up, appellants have been caught in a squeeze between the organized coercion of their customers and their duties to the supplier to avoid loss of sales. In spite of that pressure all they did was to adopt a conciliatory policy. Now they find themselves restricted in their future business in such a way that they cannot properly serve their customers or inform their suppliers. The penalty they must sooner or later pay if this decree is sustained is the loss of their wholesale businesses.

To a certain extent this appeal involves questions of fact which this Court does not ordinarily review. However, in this case appellants cannot have an appeal to an intermediate tribunal. Their only recourse is this Court.

The appeal also involves substantial questions of law. Construing the findings narrowly apart from the record, the case must stand for the proposition that the victim of a conspiracy to fix prices, if he is aware of the illegal character of the action taken against him, may not even placate those who threaten to cause him loss of sales.

Construing the findings broadly, and assuming that the vague references are sufficient to indicate that the wholesalers' association acted as a group, the decision must stand for the proposition that it is unlawful for an association to urge a lawful method of fair trade in their own community if they understand that the purpose of those who demand it is to avoid cutthroat prices rather than to protect trademarks. This is an interpretation of the fair trade law contrary to the opinion of the Supreme Court of Tennessee (*Seagram Distillers Corp.* v. *Cornswet*, 281 S.W. 2d 657, 661 (Tenn.)) and to the legislative history of the McGuire Act.

Respectfully submitted,

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December 18, 1956

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

Civil Action No. 2672

UNITED STATES OF AMERICA,

v.

MEMPHIS RETAIL PACKAGE STORES ASSOCIATION, ET AL.

THE COURT: Gentlemen, we have had a full hearing of this matter, and while the defendants may feel the pinch of this injunction, the final judgment on the record made in the trial of this case was fully justified. In the first place, the Government's case, which was virtually uncontradicted, seems to the Court a very plain one both on the facts and the law. As antitrust cases go, it was not a difficult one at all and there is really no serious legal question involved, when you get down to it. The evidence clearly established that these defendants, among other things, cooperated with the Memphis Retail Association to end quantity discounts and in computing and giving out suggested resale prices which all had agreed upon, and in urging distillers to establish and enforce minimum resale price agreements under which suggested resale prices of the distillers were adopted as "fair trade" prices. All of these defendants who agreed to do these things clearly were engaged in a combination and conspiracy to fix, maintain and stabilize prices of alcoholic beverages sold and shipped in interstate commerce. The Court's findings are quite full concerning all of these matters.

Of course, the issuance of suggested resale price lists, standing alone, would not be violative of the antitrust laws, but the proof in this case conclusively shows these price lists were used in connection with and as an integral part of an understanding and agreement between these wholesalers to fix and maintain prices, and this was wrong and

illegal. Of course, under a well-recognized rule, as we all know, legal as well as illegal acts under certain circumstances may be injoined.

Now, the final judgment in a case of this type should be drawn so that the public's interests will be fully protected. The judgment in this case describes in reasonable detail and specifically the acts to be restrained, and this is as it should be. As a matter of fact, Rule 65, I believe it is, of the Rules of Civil Procedure requires this. And there should be no room for doubt ever about the things concerning which a party is being injoined.

An injunction prohibiting the use of lists which suggest resale prices is not new, and in this type of case is very necessary as a guard against future violations. Of course, price fixing under the Socony-Vacuum case, among others, is in and of itself unlawful.

Now, the Court has entered an appropriate decree in this case, one which is remedial in its provisions. There is not anything punitive about it. The Court feels very definitely a free and a competitive market through this decree will be restored in the Memphis market. Anything short of it would not help the chaotic conditions which have been prevalent in Memphis and the Memphis territory for a long time.

In a case under the antitrust laws, a District Court is given broad discretion in the framing of its decrees. As pointed out by Mr. Justice Jackson in the International Salt Company case, with which I am sure you gentlemen are familiar, we find this:

> "The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case."

Citing United States against Cresent Amusement Company, 323 U. S. 173, and United States against National Lead Company, 332 U. S. 319.

"In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause."

Now, with respect to the decree, further, Justice Jackson had this to say also:

"The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market. When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untravelled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention. And it is desirable, in the interests of the court and of both litigants, that the decree be as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know their duties and unintended contempts may not occur."

Now, in saying there are substantial issues to be submitted to the Supreme Court, defense counsel, while attempting to analyze the Court's findings, seems to make

no mention of the evidence this Court heard for a solid week. Counsel states that he has not read this record. Counsel seems to confine his criticism to the Court's findings.

In the Court's view, the evidence in this case is overwhelming, gentlemen,—is overwhelmingly in the Government's favor. The Government has made a very complete and a very conclusive case against these defendants; and, as the Court I believe has already said, it is virtually uncontradicted. Reasonable minds in reading this record, in the Court's opinion, cannot doubt it. The Court cannot agree at all, Mr. Arnold, that its findings to implicate these defendants are nebulous, as I believe you suggested in your memorandum furnished the Court. There is no substantial issue of any kind that the Court can see to present on appeal to the Supreme Court. The defendants under the law have not met the burden of showing there is such an issue, in the Court's view.

Now, the Court thinks it is important that the judgment entered in this case not be suspended pending any appeal.

Since the companion criminal case as to these defendants was disposed of on nolo contendere pleas, it probably is not proper, the Court should say, that this be considered against the defendants on this application for a stay, and the Court will not consider same or attach any importance to it on this particular application.

Now, ordinarily the Court is glad enough to suspend its judgments pending appeals, in criminal cases as well as civil cases. But here, this conspiracy has been going on for quite some time, to the detriment of the general public as well as others, and the Court's duty in the matter is well defined.

The Court should remind counsel that this is not a case involving individuals. The public would not be protected at all if this judgment were suspended pending the out-

come of an appeal, and even though a large supersedeas bond were fixed by the Court. There would be of course no practical way to reimburse purchasers of alcoholic beverages for any overcharges. I quite agree with Mr. Carson when he says that the public very definitely has an interest in this matter. It is proper that we should look at it from this standpoint.

Now, a number of the original defendants in the case, including at least one wholesaler—, how many wholesalers came in on the consent decree, one or two?

Mr. Carson: I believe there were two individual wholesalers and one corporation.

The Court: There were a good many retailers, but I think there were only one or two wholesalers. But, as I say, they came in by consent and are under injunction, an injunction somewhat similar to the one here in question, and it would not be fair to them to permit these defendants to go along without restraint pending an appeal.

We have heard much concerning hardships resulting from the Court's decree. With this, of course, the Court is concerned. But in the situation which confronts the Court, this cannot be helped.

And it is beside the question, too, to say that Consolidated Distributors, a competitor, not a party to this litigation, will be free to disseminate to its customers price and profit information. It should be said here that Consolidated Distributors have at all times scrupulously avoided complicity in the matters complained of by the Government in this litigation, and certainly, as far as this record goes, have not engaged in any combination or conspiracy to restrain trade in interstate commerce.

So it follows, gentlemen, that the application for a stay of the Court's judgment is in all things denied.

IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

Civil No. 2672

UNITED STATES OF AMERICA, *Plaintiff*,

v.

UNITED LIQUORS CORPORATION,
SIDNEY PERLBERG,
KING KLEIN,
HUBERT R. LEWIS,
ALEX F. BARZIZZA,
GEORGE B. HART,

Defendants.

Findings of Fact and Conclusions of Law

The Court upon the pleadings and evidence adduced on the trial of this cause makes the following:

FINDINGS OF FACT

I.

Under the laws of the State of Tennessee manufacturers may not sell alcoholic beverages direct to Tennessee retailers, but may sell alcoholic beverages only to Tennessee licensed wholesalers, and Tennessee licensed retailers may buy alcoholic beverages only from Tennessee licensed wholesalers. As used herein, the term "alcoholic beverages" means whiskey, rum, gin, brandy, cordial, wine, cider, alcohol and any other spiritous, vinous, malt, or fermented liquor, liquid or compound, by whatever name called, containing one-half of one percent or more of alcohol by volume, which is fit for beverage purposes, except beer.

II.

The defendants are licensed wholesalers of alcoholic beverages having their principal places of business in

Memphis, Shelby County, Tennessee, from which they sell alcoholic beverages to licensed retailers located in the Counties of Shelby, Dyer and Lake, which presently comprise the Memphis trading areas.

The defendant United Liquors Corporation was incorporated under the laws of the State of Tennessee on July 1, 1948, and the defendant Sidney Perlberg has been its president since that date. Since sometime prior to 1949 the defendant George B. Hart has been a partner in Valley Wholesale Liquor Company and the defendant Hubert R. Lewis has been a partner in Bluff City Beverage Company. Since 1939 the defendant King Klein has been sole owner of Shelby Liquors and the defendant Alex F. Barzizza has been sole owner of Southwestern Wine Company. These individual defendant wholesalers have been continuously and actively engaged in the operation, management and control of their respective firms during the periods of time indicated above.

III.

A least 95% of all alcoholic beverages purchased and sold by licensed wholesalers and retailers within the State of Tennessee is produced outside the State of Tennessee and shipped therefrom into the State of Tennessee for sale and distribution through wholesalers and retailers to the consuming public. All alcoholic beverages purchased and sold by defendant wholesalers and other Memphis wholesalers are purchased from manufacturers located outside the State of Tennessee, with the exception of one manufacturer located in Tennessee whose products are distributed at wholesale in the Memphis trading area by Valley Wholesale Liquor Company which also distributes numerous other brands and types of alcoholic beverages purchased from manufacturers located outside the State of Tennessee. None of the various brands of alcoholic beverages are distributed by more than one of the wholesale firms

in Memphis. Alcoholic beverages purchased by the defendant wholesalers are delivered to their respective warehouses in Memphis from which orders are filled and deliveries are made to retailers located in the Memphis trading area. Each of the defendant wholesalers maintains sales and delivery forces engaged in day-to-day solicitation of orders from and deliveries to retailers.

IV.

Prior to July 1949, it had been a practice in the Memphis trading area for wholesalers to offer and give quantity discounts, sometimes referred to as "deals", in sales of alcoholic beverages to retailers. From sometime prior to July, 1949, to October 21, 1949, no State law or regulation prohibited wholesalers from offering or giving such quantity discounts. During the period October 21, 1949 to December 11, 1950, a regulation, usually referred to as "Regulation 10", issued by the Commissioner of Finance and Taxation for the State of Tennessee, prohibited wholesalers from offering or giving quantity discounts to retailers. At no time since December 11, 1950, has any State law or regulation prohibited wholesalers from offering or giving such quantity discounts to retailers.

V.

The Memphis Wholesaler Liquor Dealers Association (hereinafter sometimes referred to as the "wholesale association") was organized in 1939 as an unincorporated trade association of wholesale liquor dealers serving the Memphis trading area. Since 1949 the defendant wholesalers and their respective firms have been members of the Memphis Wholesale Liquor Dealers Association, and from time to time during this period have attended and participated in many of the Association's meetings at which frequent discussions and understandings have been had among the wholesalers, and on many occasions with representatives of the Memphis Retail Package Stores

Association, concerning the elimination of wholesale quantity discounts and other methods of stabilizing prices at the wholesale and retail levels. During all or most of the period mentioned the wholesale association employed a paid Executive Secretary whose duties included the calling of association meetings to deal with complaints or requests of the Memphis Retail Package Stores Association concerning current pricing problems in the Memphis trading area.

VI.

The Memphis Retail Package Stores Association, Inc. (hereinafter sometimes referred to as the "retail association") was organized in July, 1949 as a trade association of licensed retail liquor dealers in the Memphis trading area. At that time there were over 175 licensed retailers doing business in Memphis and all but a very few of them became members of the association. Some of the licensed retailers who did not join the retail association were known in the trade as price cutters. The principal purpose of the retail association, throughout its existence, has been to fix and maintain wholesale and retail prices of alcoholic beverages sold in the Memphis trading area.

VII.

Soon after the organization of the Memphis Retail Package Stores Association in July, 1949 its officers and some of its members on two occasions met with members of the Memphis Wholesale Liquor Dealers Association, including the defendant wholesalers, to discuss the retail association's proposals for stabilizing prices. As a result, each of the defendant wholesalers and others agreed that their respective companies would eliminate quantity discounts, would issue new price lists by a given date, and in computing such prices would adhere to the formula previously used by the Office of Price Administration during periods of Government price controls.

It was the expressed view of the retailers present that if the Government had been entitled to use the formula in establishing maximum prices, the industry should be able to use it in establishing minimum prices. The defendant wholesalers also agreed that prices so computed would be rounded off to the nearest nickel. Following these meetings, many members of the retail association either stopped or slowed down their purchases from Consolidated Distributors, a non-defendant wholesaler which had announced it would continue to offer quantity discounts. Within a short time thereafter, but before "Regulation 10" was promulgated in October 1949, however, all Memphis wholesalers, including Consolidated Distributors, had discontinued offering or giving quantity discounts to retailers.

VIII.

During the early months of 1950, after many manufacturers had, at the request of the Memphis Retail Package Stores Association, entered into resale price maintenance agreements, or so-called "fair trade" agreements, for their brands of alcoholic beverages in the Memphis trading area, members of that association took concerted action to inhibit and limit the sales and distribution of one or more brands distributed by Consolidated Distributors because such brands had not been "fairtraded". The concerted action took the form of decreased purchases, cancelled orders, return of deliveries, removal of brands from retailer shelves, and removal of advertising displays.

IX.

During 1950, Consolidated Distributors, Bluff City Beverage Company and the defendant United Liquors Corporation were boycotted by retail association members for making sales to price cutting retailers. Meetings of the Memphis Wholesale Liquor Dealers Association were held to discuss the boycotts and to agree upon a course

of action in working out the problem with the retail association.

X.

In December 1950, the Memphis Retail Package Stores Association advised manufacturers whose products were already "fair traded" in the Memphis trading area that the retail association, as a unit, would discriminate against the products of manufacturers who failed to enforce their "fair trade" contracts.

XI.

During the years 1950 and 1951, the Memphis Retail Package Stores Association maintained a Pricing Committee whose Chairman, on several occasions, appeared before the Memphis Wholesale Liquor Dealers Association to suggest and arrange for changes in the suggested retail price lists, issued by the wholesalers, in specific instances where wholesalers had not provided the full mark-up desired by the retail association.

XII.

In March 1951, or shortly thereafter, a smaller Memphis wholesaler was forced to go out of business as the direct result of a boycott imposed on "Old Quaker" whiskey which he was attempting to introduce in the Memphis market at wholesale prices and suggested retail prices which had not been approved by either the retail association or the wholesale association. The boycott immediately followed direct threats of such a boycott made at a joint meeting of the two associations and a subsequent effort by the Executive Secretary and a member of the wholesale association to persuade the wholesaler to adhere to the percentage mark-ups previously agreed upon.

XIII.

During 1951, other wholesalers were called upon at meetings of the Memphis Wholesale Liquor Dealers Association to make adjustments in their wholesale prices to retailers to conform to agreed upon mark-ups. In one instance, Consolidated Distributors was visited by a selected representative of the wholesale association to examine Consolidated's costs on particular brands to determine whether resale prices had been computed in accordance with the agreed formula.

XIV.

Despite the fact that "Regulation 10", which prohibited wholesale quantity discounts, was rescinded in December 1950, all members of the Memphis Wholesale Liquor Dealers Association refrained from offering or giving quantity discounts to Shelby County retailers until about November or December 1951. During the summer of 1951, members of the wholesale association had met with representatives of the Memphis Retail Package Stores Association and advised them that since alcoholic beverage wholesalers from Nashville, Tennessee, were offering quantity discounts to the Memphis wholesalers' customers located in counties other than Shelby, the Memphis wholesalers were losing business in those counties to Nashville wholesalers. The purpose of the meeting was to explain the wholesalers' need for offering discounts to retailers in those outlying counties, to obtain the approval of the retail association, and to assure its members that the discounting practices would not spread to Shelby County.

XV.

The principal and continuing objective of the Memphis Retail Package Stores Association throughout its existence has been to achieve a completely rigid price structure on all alcoholic beverages sold in the Memphis trading area,

both at wholesale and retail, in order that all retailers might work on identical gross profit margins without price competition. This was sought to be accomplished at the wholesale level through the elimination of wholesale quantity discounts. At the retail level, the problem was more difficult because of the large number of retailers involved and the persistent price cutting habits of some few retailers. For this apparent reason, the retail association, its officers and members have continuously sought to induce, compel, and coerce all manufacturers of alcoholic beverages to establish and enforce minimum resale prices in the Memphis trading area through the use of so-called "fair trade" agreements. The intensity of the associations' efforts to achieve this end, and the means employed by it, varied from time to time according to prevailing competitive conditions and changes which occurred in the status of the so-called non-signer provisions of the Tennessee Fair Trade Law.

XVI.

Efforts of the Memphis Retail Package Stores Association to achieve a completely stabilized market in Memphis were impeded in 1951 by a Supreme Court decision which held that under existing legislation resale price maintenance agreements were not enforceable against non-signers. In 1952, however, following enactment of the McGuire Act, which added non-signer enforcement to the Miller-Tydings exemption, a petition signed by 174 of Shelby County's 182 retailers was sent by the retail association to 20 or more major manufacturers who were urged to establish resale price maintenance agreements for their products as a means of stabilizing the retail liquor industry in Shelby County. During the period which followed, officers and members of the retail association continued their efforts to bring pressure on manufacturers by urging all retailers to give preferential sales and display treatment to all "fair traded" brands and by repeated efforts to induce

all Memphis wholesalers and manufacturers' representatives to persuade their respective manufacturers to "fair trade." By December 1953, only two or three manufacturers had responded by executing minimum resale price maintenance contracts for their brands in the Memphis trading area. In December 1953, the Memphis Retail Package Stores Association intensified its campaign for the adoption and enforcement of minimum resale prices on all alcoholic beverages and sent letters to manufacturers urging them to "fair trade" in the Memphis market.

XVII.

In January 1954, the retail association appointed a so-called "Fair Trade Committee" which formally called upon each of the defendant wholesalers and other Memphis wholesalers and requested their active support and assistance in influencing their respective suppliers to enter into "fair trade" agreements in the Memphis trading area. Each of the defendant wholesalers was at that time, and for several years had been, fully aware of the purposes, objectives and activities of the Memphis Retail Package Stores Association in its efforts to eliminate price cutting and to otherwise establish uniform prices, mark-ups and profit margins on all alcoholic beverages sold in the Memphis trading area. Each of the defendant wholesalers at that time knew that it was not the purpose or intent of the retail association to promote the purpose of the Miller-Tydings Act, or the McGuire Act, or the Fair Trade Law of Tennessee, or to establish prices for the protection of the good will in the trademarks, brands or names of the manufacturers of alcoholic beverages. To the contrary, each of the defendant wholesalers was at that time fully aware of the purpose to use "fair trade" agreements as devices for establishing and enforcing adherence to a system of uniform retail prices pursuant to an agreement and understanding among members of the retail association. In response to the request of the Fair Trade Committee,

each of the defendant wholesalers agreed to urge his suppliers to fair trade.

XVIII.

At a meeting of the Memphis Retail Package Stores Association on or about February 20, 1954, members were openly urged to discriminate against non-fair-traded brands and were provided with copies of a document, known in the trade as the "Ten Commandments", instructing them to remove from retail stores all advertising of non-fair-traded brands, to give such brands the worst possible shelf positions, to make every effort to switch every customer away from non-fair-traded brands, to decrease actual sales of non-fair-traded brands, and to insist on elimination of wholesale quantity discounts to price cutters. The "Ten Commandments" received wide circulation and publicity among retailers, wholesalers and manufacturers of alcoholic beverages.

XIX.

Within a short time after the issuance of the "Ten Commandments", many members of the retail association were adhering to its terms in an all-out effort to force manufacturers to "fair trade" their products in the Memphis market. As a result, the sales volume of many of the leading non-fair-traded brands began to decline through lack of adequate displays, advertising and sales promotion in retail stores. The discrimination against non-fair-traded brands was greatly intensified and the number of retailers participating in the scheme advanced on an increasing scale during the months of March to September 1954. During this period, the retail association organized and instructed squads of its members to make periodic visits to groups of retail stores to observe their displays and treatment of "fair-traded" brands, as against non-fair-traded brands, and to urge continued adherence to the scheme. Lists of "fair-traded" brands and their prices

were prepared and distributed by the retail association for the guidance of its members. Sales of many leading non-fair-traded brands declined very substantially. Members of the retail association received frequent oral and written admonitions from association officers and other members to sell and display nothing but "fair-traded" brands.

XX.

The facts recited in Paragraph 19 hereof were concurrently the subject of widespread discussion in the trade and all Memphis wholesalers and their respective suppliers became acutely aware of the nature and purpose of the retail association boycotting activities and the resulting effect on sales. Many of the manufacturers were urged by their Memphis wholesalers, including defendant wholesalers, to "fair-trade" their products and, in some instances, were furnished by the wholesalers with the suggested retail prices to be established, and they were established, as the manufacturers' so-called "fair-trade" prices. On some occasions, officers and other representatives of the retail association met with manufacturers or their representatives to discuss and agree upon details of proposed "fair trade" agreements, including specific prices to be established and the actual signing of the minimum resale price maintenance contracts at association meetings.

XXI.

Prior to March 1954, only two or three manufacturers had "fair traded" their products in the Memphis trading area at any time after the McGuire Act became effective in 1952. During the period of March 1954, through August 1954, however, virtually all manufacturers whose brands were distributed by the defendant wholesalers and other Memphis wholesalers, other than Consolidated Distributors, "fair traded" their brands in the Memphis trading area. None of the products distributed by Consolidated

Distributors were "fair traded" at that time or at any subsequent time.

XXII.

As a result of the retail association boycott of non-fair-traded brands in 1954, Consolidated Distributors experienced a very substantial decline in sales to retailers participating in the boycott activities, particularly during the period June through August 1954, when the brands of Consolidated Distributors were prominent among the very few remaining non-fair-traded brands in the Memphis market.

XXIII.

During or shortly before the month of June 1954, the Executive Secretary of the Memphis Wholesale Liquor Dealers Association resigned his position following the Association's action in reducing his salary and expressing dissatisfaction with his services for the stated reason that he was unable to bring one member, Consolidated Distributors, "into line" with the seven other members. At about the same time, Consolidated Distributors resigned from the wholesale association. All of the defendant wholesalers were members of the wholesale association at that time.

XXIV.

Some of the manufacturers of alcoholic beverages who during 1954 entered into "fair trade" agreements, by which minimum resale prices were established on their respective brands being sold in the Memphis trading area, expressly limited the application of the agreements to the Memphis area, and did not enter into "fair trade" agreements to cover their identical products being sold through licensed retailers located in the other areas of the State of Tennessee. Still other manufacturers in 1954 "fair traded" their brands in the Memphis trading area at prices which varied widely from the "fair trade" prices for identical brands which they were establishing in other areas of Tennessee at or about the same time.

XXV.

Soon after establishing "fair trade" prices on their respective brands in the Memphis trading area in 1954, most of the manufacturers were pressed by officers and members of the Memphis Retail Package Stores Association, through their respective local representatives and wholesalers in Memphis, including defendant wholesalers, to enforce adherence to the minimum resale prices so established. As a result several of the manufacturers sought and obtained injunctions against various Memphis retailers who were alleged to have made sales below minimum "fair trade" prices. Some of the same manufacturers later sought dissolution of the injunction after the United States Department of Justice in October 1954, began its investigation which preceded the filing of the complaint in this case.

XXVI.

All of the defendants have been and are now engaged in a combination and conspiracy to fix, maintain, and stabilize prices of alcoholic beverages sold and shipped in interstate commerce.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the subject matter hereof and of each of the defendants.

II

The defendants have been and are now engaged in an unlawful combination and conspiracy to restrain interstate trade and commerce in the sale and distribution of alcoholic beverages in violation of Section 1 of the Sherman Act. U. S. v. McKesson & Robbins, 351 U.S., 305, 309 (1956); Kiefer-Stewart v. Seagram & Sons, 340 U. S., 211 (1951); American Tobacco Co. v. United States, 328 U. S., 781 (1946); United States v. Frankfort Distilleries, 324

U. S., 293 (1945); United States v. Socony-Vacuum Oil Co., 310 U. S., 150 (1940); Lloyd v. United Liquors Corp., et al, 203 Fed. 2nd, 789 (1953).

MARION S. BOYD
United States District Judge

7-31-56

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 2672—Civil Action

UNITED STATES OF AMERICA, *Plaintiff*,

v.

UNITED LIQUORS CORPORATION, SIDNEY PERLBERG, KING KLEIN, HUBERT R. LEWIS, ALEX BARZIZZA and GEORGE B. HART, *Defendants*.

Final Judgment

PREAMBLE

This case was tried upon the complaint, answers of the defendants United Liquors Corporation, Sidney Perlberg, King Klein, Hubert R. Lewis, Alex F. Barzizza and George B. Hart, and evidence taken in court between July 5, 1956 and July 12, 1956. The Court having duly filed its findings of fact and conclusions of law.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED, as follows:

I.

(A) This Court has jurisdiction of the subject matter of this cause of action and of each of the defendants named in the preamble of this judgment;

(B) The complaint states a cause of action against the said defendants, and each of them, under Section 1 of the Act of Congress of July 2, 1890, 26 Stat. 209, 15 U.S.C., Sec. 1, as amended, commonly known as the Sherman Act;

(C) The said defendants have combined and conspired to restrain interstate trade and commerce in the sale of alcoholic beverages within the State of Tennessee in violation of Section 1 of the Sherman Act.

II.

As used in this Final Judgment:

(A) "Person" shall mean an individual, partnership, firm, corporation, association, trustee or any other business or legal entity;

(B) "Alcoholic Beverage" shall mean any whiskey, rum, gin, brandy, cordial, wine, cider, alcohol or any other spirituous, vinous, malt or fermented liquor, liquid or compound, by whatever name called, containing one-half of one per cent or more of alcohol by volume, which is fit for beverage purposes, except beer;

(C) "Manufacturer" shall mean any person who distills, rectifies, blends, ferments or bottles any alcoholic beverage, or imports into the United States any alcoholic beverage from outside the United States, or who, as a distributor of alcoholic beverages, sells to a wholesaler for resale to a retailer;

(D) "Memphis Trading Area" shall mean Shelby County, Tennessee, and other Counties in the State of Tennessee supplied with alcoholic beverages by Memphis wholesalers.

III.

The provisions of this Final Judgment applicable to any of the said defendants shall apply to such defendants, their officers, agents, servants, employees and attorneys,

and to those persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise. For the purposes of this Final Judgment, a defendant and the respective officers, agents, servants, employees and attorneys thereof shall be deemed to be one person when acting in such capacity.

IV.

The said defendants are jointly and severally enjoined and restrained from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, understanding, concerted plan or program among themselves or with any other person, to:

(A) Control, fix, raise, adopt, stabilize or maintain prices, mark-ups, margins of profit, terms or conditions at which alcoholic beverages are sold or offered for sale to third persons;

(B) Control, fix, raise, adopt, stabilize, maintain or eliminate discounts at which alcoholic beverages are sold or offered for sale to third persons;

(C) Induce, compel or coerce, or attempt to induce, compel or coerce any person to adhere to, or to police or enforce adherence to, prices, terms or conditions at which alcoholic beverages will be sold to any person, or to any group or class of persons;

(D) Communicate, directly or indirectly, with any manufacturer or wholesaler for the purpose of inducing, compelling or coercing such manufacturer or wholesaler to establish, adopt, issue or enforce minimum or suggested resale prices, mark-ups, margins of profit or discounts at which alcoholic beverages are sold or offered for sale to third persons;

(E) Communicate, directly or indirectly, with any manufacturer or wholesaler for the purpose of inducing,

compelling or coercing such manufacturer or wholesaler to refrain from selling, or to otherwise discriminate in the sale of, alcoholic beverages to any person or to any group or class of persons;

(F) Boycott or otherwise refuse to deal with, or threaten to boycott or otherwise refuse to deal with any person engaged in the purchase, sale or distribution of alcoholic beverages;

(G) Induce, compel or coerce, or attempt to induce, compel or coerce any person to boycott or otherwise refuse to deal with any person engaged in the purchase, sale or distribution of alcoholic beverages;

(H) "Push" or give preference to alcoholic beverages on the condition or understanding that the manufacturer or wholesaler thereof establish, adopt, issue or enforce, or agree to establish, adopt, issue or enforce minimum or suggested resale prices, mark-ups, margins of profit or discounts thereon.

Nothing in this Section IV shall be deemed to prohibit the said defendants from proposing or supporting legislation or the adoption of local, state, or federal regulations, relating to the purchase, sale or distribution of alcoholic beverages or from individually taking action required by local, state or federal legislation or regulation.

V.

(A) Each of the said defendants is enjoined and restrained, for a period of three years from the effective date of this final judgment, from disseminating, or preparing for dissemination, to any person price lists or other price information containing minimum or suggested resale prices, mark-ups, or margins of profit for alcoholic beverages to be sold or offered for sale to third persons;

(B) Each of the said defendants is enjoined and restrained from belonging to or participating in any

organization, or concerted plan or program, for policing prices at which alcoholic beverages are sold or offered for sale by any person.

VI.

(A) Each of the said defendants is enjoined for a period of five years from the effective date of this final judgment, from entering into, adhering to, or pricing pursuant to any fair trade contract which purports to fix or control the resale price of any alcoholic beverage in the Memphis trading area, and, to the extent that any such defendant elects to sell alcoholic beverages in the Memphis trading area during said period of five years to do so at prices individually determined by himself, without reference to fair trade prices established thereon.

(B) Each of the said defendants is enjoined and restrained for a period of five years from the effective date of this final judgment from urging, suggesting or otherwise inducing any manufacturer or wholesaler to establish, adopt, issue or enforce minimum or suggested resale prices for alcoholic beverages.

VII.

The said defendants are jointly and severally enjoined and restrained from organizing, becoming a member of, or participating directly or indirectly in the activities of any trade association or other organization, the purposes or functions of which relate to the distribution or sale of alcoholic beverages contrary to any provision of this Final Judgment.

VIII.

For the purpose of securing compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney

General in charge of the Antitrust Division, and on reasonable notice to any said defendant, made to its principal office, be permitted:

(A) Access during the office hours of such defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant relating to any matters contained in this final judgment, and

(B) Subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters.

Upon request each of said defendants shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of said judgment. No information obtained by the means provided in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

IX.

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

X.

Judgment is entered against the said defendants for all costs to be taxed in this proceeding.

Dated: August 1st, 1956.

MARION S. BOYD
United States District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 637

UNITED LIQUORS CORPORATION, ET AL., ~~PETITIONERS~~ Appellants

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c) of the Revised Rules of this Court, the appellee moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment entered by the district court on August 1, 1956, adjudging that appellants had combined and conspired to restrain interstate commerce in the sale of alcoholic beverages in Memphis, Tennessee in violation of Section 1 of the Sherman Act, 15 U. S. C. 1, and granting injunctive relief. The complaint, charging such violations by appellants and others,[1] was filed on June

[1] The complaint named as parties (1) the appellants, who are liquor wholesalers, (2) the wholesalers trade association, as to

30, 1955. After trial, the district court on July 31, 1956, entered findings of fact and conclusions of law (J. St. 6a–19a), and on September 14, 1956, the court delivered an oral opinion denying appellant's motion to stay the judgment (J. St. 1a–5a). This motion was subsequently denied, first by Mr. Justice Reed on September 19, 1956 (see App., *infra*, pp. 11–13) and then by the Chief Justice on September 25, 1956.

In July 1949 retailers of alcoholic beverages in Memphis organized an association in order to "fix and maintain wholesale and retail" liquor prices in Memphis (Fdg. VI; Tr. 402–03, 505–06, 936–38). Shortly thereafter, as a result of joint meetings with the retailers, the wholesalers, including appellants, offered to discontinue (Tr. 409–11), and did in fact discontinue, quantity discounts to the retailers (Fdgs. VII, XV).[2] The wholesalers also promised to adhere to a formula for suggested retail prices in their price lists (Fdg. VII; Tr. 243, 246, 270), which prices were adjusted in several instances after conferences between representatives of the wholesalers' and retailers' association (Fdg. XI; Tr. 180–87). The wholesalers' association exhorted its members "to conform

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which there was a default judgment, and (3) liquor retailers and their trade association, who consented to a decree enjoining the complained of activities.

[2] Although a state regulation (promulgated in October 1949), which prohibited wholesale quantity discounts, was repealed in December 1950, wholesalers did not resume discounts in Memphis until November or December 1951 (Fdgs. IV, XIV). And in the summer of 1951 the Memphis wholesalers, at a meeting with retailers, had assured the latter that discounting, being resumed in other Tennessee counties because of the competition of Nashville wholesalers, "would not spread to Shelby County," *i. e.*, Memphis (Fdg. XIV).

to agreed upon mark-ups" and investigated one wholesaler suspected of non-compliance (Fdg. XIII; Tr. 214–17). In March 1951 a small wholesaler, who marketed a brand at prices not approved by the retailers' or the wholesalers' association, went out of business after a boycott which had been induced by the wholesalers (Tr. 421–27) and which immediately followed threats of such action at a joint meeting of the associations (Fdg. XII; Tr. 419–27, 621–28, 633–35).

Early in 1950 (Tr. 507), the retailers' association undertook "to get the distilleries to fair-trade and to stabilize the price market in Memphis" (Tr. 505–06). See also Tr. 433–35, Fdgs. VIII, XV. Distillers were urged to enforce their contracts (Fdg. X; GX–123, received in evidence, Tr. 102–104), and wholesalers who sold non-fair trade brands were subjected to concerted pressures by the retailers (Fdg. VIII; Tr. 507–11, 884). These efforts, which had been successful during 1950 and early 1951 (Fdgs. VIII, XV), were temporarily halted in May 1951 by this Court's decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, but were resumed in 1952 after passage of the McGuire Act (Fdg. XVI; Tr. 996–97, 1012–13).

Lack of appreciable success in again securing fair trade contracts (Fdg. XVI) prompted the retailers formally to enlist the "active support and assistance" of the wholesalers in influencing their suppliers to enter into such contracts (Fdg. XVII). Each of the appellant wholesalers, "fully aware" of the retailers' purpose to establish uniform prices through fair trade contracts, agreed to urge his suppliers to "fair trade"

(Fdg. XVII), and in fact the wholesalers did so urge many of their suppliers (Fdg. XX). Thus, at the request of the retail association's fair trade committee, the wholesalers wrote letters to the Committee endorsing fair trade (Tr. 350–51; see Tr. 189–92), which were read at the association meetings (Tr. 523). Appellant Klein stated that he would do "whatever he could" with his suppliers (Tr. 520), for, as he said in his letter of January 28, 1954, "we [the wholesalers] are just as anxious as you are to see the entire business stabilized" (GX–46, received in evidence, Tr. 37–38). Appellant Perlberg was "very much in favor of it" (Tr. 523) and hoped the Memphis market could be "cleared up" (Tr. 523–24) through fair trade. Another wholesaler testified that he would "do anything I could to help straighten out a market that certainly needed straightening out" and that fair trade "was the only thing that would straighten out this market for everybody" (Tr. 1169–70). On at least one occasion, appellant Klein participated in the negotiation and signing of a fair trade contract between a distiller and retailers (Tr. 481–91; see Tr. 532). The wholesalers carried on a large correspondence with the distillers urging fair trade, reporting pertinent information, and sometimes furnishing the distillers with the retailers' suggested prices, which were then established as the distillers' fair trade prices (Fdgs. XX, XXV). Moreover, the retailers pressed the distillers "through their * * * wholesalers in Memphis," including appellants, "to enforce adherence to" the contracts, by securing injunctions against price-cutting retailers (Fdg. XXV; Tr. 1131).

Simultaneously, the retailers' association and its members were engaged in an "all-out effort" to force the distillers to "fair trade" their products, by removing from retail stores all advertising of non-fair-traded brands, by giving such brands the worst possible shelf position, and by making every effort to switch customers from such brands (Fdgs. XVIII, XIX). "Squads" of retailers were sent by the association to make "periodic visits" to retail outlets (Fdg. XIX; Tr. 525–27, 749, 753–56). As a result, sales of many non-fair-traded brands declined "very substantially" (Fdgs. XIX, XXII), and "virtually all" distillers distributing through appellants fair-traded their brands in the Memphis trading area (Fdg. XXI),[3] although many limited their contracts to Memphis alone or fair-traded in Memphis at prices which "varied widely" from prices prevailing elsewhere in Tennessee (Fdg. XXIV).

ARGUMENT

1. The first question presented by appellants (J. St. 2) appears to be an attack on the court's determination that appellants' participation in a conspiracy to fix, maintain and stabilize prices of alcoholic beverages shipped in interstate commerce for sale in the Memphis trading area constituted a violation of the Sherman Act (see Fdg. XXVI; Concl. of Law II, J. St. 18a).

[3] Prior to March 1954, there were only two or three manufacturers who were fair trading their products in this area (Fdg. XXI).

We submit that, on the issue of violation, *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, is conclusive. In that case certain wholesalers, retailers, and distillers were indicted for conspiring to raise, fix, and maintain retail prices of alcoholic beverages sold in the State of Colorado, by means which included agreement among Colorado retailers and wholesalers to "persuade and compel" out-of-state producers to enter into fair trade contracts on alcoholic beverages shipped into the state. This Court held that since the means adopted for effectuating the conspiracy "reached beyond the boundaries of Colorado," it was immaterial that the ultimate object of the conspiracy was the fixing or maintenance of local retail prices. 324 U. S. at 298. The Court also held that the conspiracy was not within the exemptions from the Sherman Act given by the Miller Tydings Act, because these exemptions do not apply to agreements among competitors, *i. e.*, agreements among retailers and agreements among wholesalers, to enter into "fair trade" contracts. *Id.* at 296.

The second question presented (J. St. 2–3)—whether it is a violation of the Sherman Act for wholesalers to discuss at their meetings the "desirability" that their suppliers adopt fair trade contracts and that each wholesaler recommend this policy to its own suppliers—rests on factual assumptions inconsistent with the court's findings. The assumption which underlies this question is that, although appellants admittedly had been parties to a price-fixing conspiracy from early 1949 to late 1951 (J. St. 4), the conspir-

acy was abandoned in 1951, and that their participation in any price-fixing conspiracy is therefore to be tested solely by what they did after 1951. Appellants were the only parties who went to trial. Accordingly, the court's findings setting forth the various conspiratorial acts and developments during the period 1949–1954 necessarily mean that the court found that the conspiracy in which the appellants were engaged was a continuing one from its inception in 1949 to the filing of the Government's complaint. Furthermore, no evidence of abandonment in 1951 was introduced, and abandonment of a continuing conspiracy will not be presumed in the absence of "definite proof to that effect." *Local 167* v. *United States,* 291 U. S. 293, 298.

The fact that the conspirators were unable to achieve their objectives for a temporary period following the decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U. S. 384, does not even suggest that the conspiracy itself was abandoned. The principal objective was "to achieve a completely rigid price structure on all alcoholic beverages sold in the Memphis trading area" (Fdg. XV), and diverse means were used for achieving this objective. The conspiracy was in no respect terminated when appellants, after discontinuing quantity discounts pursuant to the conspiracy, resumed the practice of granting such discounts.

The questions of substantive law said to be presented, constitute, as appellants concede "[t]o a certain extent" (J. St. 17), an attack on the district

court's findings of fact. These questions involve review by this Court of the entire evidence, oral and documentary. This attack is made in the face of the district court's observation that the evidence was "overwhelmingly in the Government's favor" (J. St. 4a). Appellants have also not even attempted to show error in the findings, notwithstanding the provision that a trial court's findings of fact shall not be set aside "unless clearly erroneous" (Rule 52 (a), Federal Rules of Civil Procedure).

2. In the third and fourth questions presented, appellants attack as innappropriate the prohibition, for a period of three years, against distributing suggested resale prices, and the prohibition, for a period of five years, against entering into fair trade contracts (J. St. 3).[4]

Issuance of suggested retail price lists was an "integral part" of appellants' conspiracy (J. St. 1a), and the court below concluded that an injunction prohibiting use of such lists was "very necessary" to prevent future violations of the statute (J. St. 2a). Under facts similar to those here, such an injunction has been held to be an appropriate type of relief. *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 717–718. Inducing or compelling others to enter into fair trade contracts was also a central element in appellants' conspiracy. In *Bausch & Lomb* the district court had likewise enjoined for a limited period the making of fair trade contracts. In sustaining this

[4] Question 4, as stated, embodies the erroneous conspiracy-abandonment assumption. The fifth question (J. St. 3) explicitly challenges the sufficiency of the evidence.

prohibition, this Court said: "Equity has power to eradicate evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole." 321 U. S. at 724.

Appellants urge that the injunctive provisions will put them at a competitive disadvantage vis-à-vis Consolidated Distributors, the largest Memphis wholesaler. The asserted competitive disadvantages are purely conjectural, and the court, having retained jurisdiction to modify its judgment (J. St. 24a), can appropriately modify the prohibitions if actual experience demonstrates that they work an undue hardship on appellants. Appellants cannot legitimately complain because restrictions, from which a competitor is free, were imposed in order to restore a free and competitive market to the Memphis area. Not only had the conspiracy subjected this competitor to boycotts, which caused a very substantial decline in its 1954 sales (Fdgs. XIX, XX), but this competitor had "at all times scrupulously avoided complicity in the matters complained of by the Government in this litigation" (J. St. 5a).

We submit that the relief granted in the instant case was well within the "large discretion" vested in district courts "to model their judgments to fit the exigencies of the particular case." *International Salt Co.* v. *United States,* 332 U. S. 392, 400–401.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no

substantial question. The judgment of the district court should be affirmed.

Respectfully submitted,

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JANUARY 1957.

APPENDIX

Supreme Court of the United States

UNITED STATES OF AMERICA

v.

UNITED LIQUORS CORPORATION, ET AL.

MOTION FOR STAY

In the above case there has been presented to me a motion to stay the effectiveness of the final judgment entered by District Judge Boyd of the Western District of Tennessee.

The judgment was entered in a suit against defendants brought under § 1 of the Sherman Act, charging defendants with a conspiracy to fix and maintain prices.

By the findings of fact the District Court determined that the defendants had conspired with a retail association of liquor dealers to eliminate price cutting and establish uniform prices, mark-ups and profit margins on alcoholic beverages sold in the Memphis trading area. It was further found that each defendant wholesaler was fully aware of the purpose to use fair trade agreements as devices for establishing and enforcing adherence to uniform retail prices. It was further found that said conspiracy was carried out by members of the Retail Package Stores Association through organized efforts to increase the sales of the fair-traded brands against non-fair-traded brands. It was found that these efforts were successful. It was further found that defendant wholesalers

participated in obtaining the institution of fair trade prices by the manufacturers.

Upon reaching the conclusion that the defendants had participated in an unlawful combination and conspiracy to restrain trade in interstate commerce in the sale of alcoholic beverages, the court entered the judgment which is sought to be stayed. In summary, the judgment enjoined the defendants, jointly and severally, from furthering any contract or program to stabilize and control prices, eliminate discounts in sales, induce or coerce any person to establish or enforce adherence to prices, or communicate with any manufacturer in an effort to induce the establishment of minimum or suggested resale prices. The trial court overruled defendants' motion to stay this judgment pending appeal.

For purposes of this motion, here, defendants object to paragraphs V (A) and VI (A) of the judgment. Paragraph V (A) restrains them from disseminating "price lists or other price information containing minimum or suggested resale prices, mark-ups, or margins of profit for alcoholic beverages to be sold or offered for sale to third persons." Under paragraph VI (A) of the judgment, defendants are enjoined for five years from entering into or adhering to any fair trade contract "which purports to fix or control the resale price of any alcoholic beverage in the Memphis trading area."

Defendants contend that these limitations on their activities must seriously affect their ability to compete with other wholesalers who have not been enjoined from such acts, that there is danger that producers of alcoholic beverages will withdraw from defendants their franchise or agency for distribution, and that they will suffer irreparable injury if compelled to abide by the terms of the judgment until such time as

review may be had in this Court under the provisions of 15 U. S. C. § 29. Defendants alone file supporting affidavits.

The defendants have been found to have violated the antitrust laws and the decree has been framed by the judge of the trial court to correct the evils which resulted from the acts found unlawful. In framing a decree a judge has authority to enjoin actions otherwise lawful when such action is deemed by him necessary to correct the evil effects of unlawful conduct. *United States* v. *U. S. Gypsum Co.*, 340 U. S. 76, 88–89; *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 724. The decree here leaves open the opportunity to defendants to carry on their usual business of selling liquor at wholesale, prohibiting only those selling methods which it was thought would continue the conspiracy to control resale prices and the effects of that conspiracy.

Weighing the economic harm and the "fear" of future irreparable injuries flowing to defendants from the existence of the decree, during the pendency of their direct appeal to this Court, against the public detriment which would result from a continuation of unlawful price fixing, the motion for a stay is denied. Cf., *Yakus* v. *United States*. 321 U. S. 414, 440–441.

(Signed) STANLEY REED,
Associate Justice,
Supreme Court of the United States.

SEPTEMBER 19, 1956.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 637

UNITED LIQUORS CORPORATION, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court for the Western District of Tennessee, Western Division

MEMORANDUM IN REPLY TO APPELLEE'S MOTION TO AFFIRM

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MEMORANDUM IN REPLY TO APPELLEE'S MOTION TO AFFIRM

On page 9 of the Motion to Affirm filed by the Government in the above entitled case appellee makes the following statement about the provisions of the decree which we assert put appellants under a competitive disadvantage with respect to the largest liquor wholesaler in Memphis:

> "Appellants urge that the injunctive provisions will put them at a competitive disadvantage vis-à-vis Consolidated Distributors, the largest Memphis wholesaler. The asserted competitive disadvantages are purely conjectural, and the court, having retained jurisdiction to modify its judgment (J. St. 24a), can appropriately modify the prohibitions if actual experience demonstrates that they work an undue hardship on appellants."

In reply we wish to point out that the disadvantage can in no way be claimed to be conjectural. The

Government has not denied a single assertion in the affidavits filed by appellants on their motion to stay. Apart from such affidavits we believe that the Court should take judicial notice that inability to talk about prices and thus to advise a retailer on his expected profits for a brand of liquor puts salesmen at a severe competitive disadvantage. So far as the court's modifying the provisions of the decree in this respect we point out that after a full hearing the court refused. Therefore, this issue should be decided by this Court. The only further proof we can produce is the loss of liquor franchise of one of the appellants at which time it will be too late to give him any relief against the competitive hardship imposed on him by the decree.

Respectfully submitted,

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January 25, 1957

United States.

No. 637. UNITED LIQUORS CORP. ET AL. *v.* UNITED STATES. Appeal from the United States District Court for the Western District of Tennessee. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Hal Gerber, Robert L. Taylor, Thurmond Arnold, Charles A. Noone* and *Harry C. Pierotti* for appellants. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Charles H. Weston* for the United States.

No. 652. RADFORD *v.* GARY, GOVERNOR OF OKLAHOMA.